

No. 49158-3-II  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II  
Pierce County Superior Court No. 15-1-02250-6

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STATE OF WASHINGTON  
Respondent

vs.

LARRY J. LEE, JR.  
Appellant

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Brief of Appellant

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A. ASSIGNMENTS OF ERROR

1. The State did not sufficiently establish the corpus delicti of the crime apart from Mr. Lee's statements.
2. The trial court abused its discretion in granting the State a continuance of the trial to May 31, 2016.
3. The trial court abused its discretion in admitting speculative expert opinion as to the cause of ambiguous marks on Mr. Carter's body.
4. Counsel provided ineffective assistance of counsel by failing to adequately investigate and research the issues in Mr. Lee's case.
5. Repeated instances of prosecutorial misconduct denied Mr. Lee a fair trial.
6. The accumulation of errors in Mr. Lee's case requires a new trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Carter died of a naturally occurring sepsis infection.  
  
The State's strongest evidence that criminal agency caused Mr. Carter's death consisted of Mr. Lee's statements that he had been taking measures to treat Mr. Carter's bedsores, which suggested that Mr. Lee may have assumed the duty

to provide medical treatment to Mr. Carter. Did the State admit prima facie evidence to corroborate these admissions?

2. Judge Orlando denied the State a continuance of the March 24, 2016 trial date based on the expert witness' unavailability and a detective's scheduled vacation. On March 24, 2016, Judge Schwartz granted a continuance of the trial to May 31, 2016 given the additional justification that one of the prosecutors now had a trial conflict. Did the trial court abuse its discretion in granting the continuance?
3. The trial court allowed wound care nurse Melanie Burnam, over defense objection, to speculate that a strap or restraint was the cause of marks on the trunk of Mr. Carter's body. Did this ruling constitute an abuse of discretion?
4. Defense counsel made numerous decisions that were detrimental to Mr. Lee's chances of success at trial due to a misunderstanding of the State's burden of proof with regard to the charge of felony murder and his failure to investigate the case. Was counsel's performance constitutionally deficient?

5. The prosecution purposefully elicited inadmissible evidence, made unsupported arguments during her closing argument, and appealed to the passion and prejudice of the jury. Were these actions flagrant and ill-intentioned so as to deprive Mr. Lee of a fair trial?
6. If the court's erroneous rulings and the prosecutor's improper actions did not individually constitute reversible error, do the cumulative effect of the errors require a new trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Mr. Lee was charged in Pierce County Superior Court with one count of second degree murder with a predicate felony of criminal mistreatment in the first and/or second degree and one count of first degree manslaughter. CP 154-155. Mr. Lee was found guilty at trial and the trial judge, the Honorable Michael E. Schwartz, entered judgment and imposed a standard range sentence of 220 months confinement for second degree murder. CP 243; CP 312-320. This timely appeal followed.



## 2. Substantive Facts

On May 15, 2015, Phillip George Carter was admitted to Good Samaritan Hospital in Puyallup, Washington, where doctors unsuccessfully attempted to treat his infected bedsores in the intensive care unit. 2RP 422-49. Mr. Carter travelled to the hospital earlier that day in an ambulance from the home of Larry Lee, where it was reported that he had been found unresponsive. 2RP 323.

The cause of Mr. Carter's death was sepsis, a bacterial infection of the blood, secondary to infected bedsores. 2RP 518-519; Ex. 22. Sepsis is a natural cause of death. 2RP 521. Mr. Lee told detectives that he had been providing various caregiving services for Mr. Carter, including treating the bedsores with gauze and Neosporin, and that he had been helping Mr. Carter more than he had in the past due to his recent immobility. 2RP 542-547; 2RP 550.

On March 9, 2016, the Honorable Judge James Orlando presided over a motion hearing addressing defense counsel's Knapstad motion to dismiss Mr. Lee's case and ultimately denied the motion. 1RP 11. The State moved for

a continuance of the March 24, 2016 trial date to June, 2016 based upon the unavailability of its expert witness, Dr. Locatell, related to her appearance at other trials, as well as a scheduled vacation for its lead detective the first week of April. 1RP 12-14. The State pointed out that the defense had not made any requests to interview its witnesses. 1RP 12.

Defense counsel objected to the continuance. He explained that his failure to interview the State's witnesses was intentional due to the "minimal" factual disputes in the case, i.e., whether Mr. Carter was merely a tenant of Mr. Lee. 1RP 13. He also informed the court that he had not spoken with Mr. Carter's doctor, who he was considering calling as a witness, but stated that he "could not" speak with the doctor because of "HIPAA and that." 1RP 14.

Judge Orlando denied the motion for a continuance. 1RP 14. The State made a subsequent written motion for continuance on March 22, 2016, renewing its March 9, 2016 requests and noting that one of the assigned prosecutors, Bryce Nelson, had a scheduling conflict with another trial to be called on the same date. CP 34-38. Judge

Schwartz signed an order granting the continuance, rescheduling the trial for May 31, 2016. CP 42.

Prior to the motion hearing, counsel filed a declaration signed by Mr. Lee, and later a substantively identical affidavit signed by Mr. Lee, containing admissions that Mr. Lee “did what he could” to “maintain” Mr. Carter, including providing meals and laundry, and trying to take him to the doctor. CP 9-10; CP 21-22. Counsel filed a motion to accompany this evidence that reflected a stark misunderstanding of the State’s burden of proof with regard to the elements of first and second degree criminal mistreatment. CP 29-30.

Prior to trial, the State made a plea offer to second degree murder, with a “low end” recommendation and no aggravator. Through counsel, Mr. Lee rejected this offer, and the State rejected counsel’s counteroffer of a plea to criminal mistreatment in the second degree. 2RP 5.

Mr. Lee moved pretrial for a determination that the State could not establish the corpus delicti of murder or manslaughter. 2RP 48-58; CP 63-64. The Court framed the motion as a motion to dismiss and denied the motion,

finding from the State's offer of proof that evidence of a verbal agreement between Mr. Lee and the decedent's sister to provide caregiving services, in effect at the time of Mr. Carter's death, established the corpus delicti. 2RP 60. The Court indicated that it would revisit the issue after the State rested if necessary. 2RP 60.

At trial, the decedent's sister, Judith Barber, actually testified that toward the end of 2014, Mr. Lee called her to inform her that, because he had not passed the necessary testing, he would not receive funding from the State for caregiving any longer and inquired whether she would like to provide funding for caregiving services. 2RP 362-63.

Ms. Barber declined, explaining that her own finances were tight and that she was still looking into other options for caregiving services. 2RP 363. At the time of Mr. Carter's death in 2015, Mr. Lee's employment to provide caregiving services had expired and Mr. Carter's file with the State had been closed as no new caregiver had been designated. 2RP 589-91.

During his opening statement, defense counsel promised the jury evidence that Mr. Lee made an appointment for Mr. Carter to see the doctor on May 4, 2015, but that Mr. Carter refused to go. 2RP 317. Marlene Calhoun, Mr. Lee's mother, testified on the subject but could not remember the exact date of the appointment in early May. 2RP 709.

Counsel also pointed out in his opening statement that Mr. Carter had access to a telephone. 2RP 318. On the one hand, counsel suggested that Mr. Lee merely provided room and board to Mr. Carter, but on the other hand he agreed that Mr. Lee also provided "extras" and tried to help Mr. Carter, while suggesting that his death ultimately arose from the choice of "comfort care" over medical intervention. 2RP 318.

Defense counsel later elicited testimony through cross-examination of Ms. Barber, Mr. Carter's sister, that surgical intervention, rather than comfort care, was not a viable option because the surgeon believed that Mr. Carter was brain dead and that he would not survive surgery. 2RP

371. Defense counsel also elicited from Ms. Barber that Mr. Carter could not dial the telephone. 2RP 373.

The cross examination of each State witness was extremely short with the witness' answers appearing to surprise defense counsel. 2RP 339-341; 2RP 349-350; 2RP 371-375; 2RP 395-396; 2RP 426; 2RP 461-65; 2 RP 492-93; 2RP 504; 2RP 524-25; 2RP 571; 2RP 591-95; 2RP 646-49; 2RP 679-81.

A main argument in the State's closing argument was that Mr. Lee was a mandatory reporter and should have alerted someone to the decline in Mr. Carter's condition. 2RP 751-58; 2RP 777-78. Cynthia English, a social worker for Home and Community Service, testified that she evaluated Mr. Lee to become an individual provider for Mr. Carter. 2RP 621.

Ms. English casually and generally mentioned Mr. Lee was to watch a 15-minute video which included information on mandatory reporting. 2RP 612. She also indicated that if there were any changes with the client, that he should call a case worker so they could adjust his hours. 2RP 628-29. Ms. English is the only person who provided a

non-specific and unclear definition of a mandatory reporting requirement; it was never made clear that Mr. Lee was bound by any mandatory reporting requirement. 2RP 630.

During the testimony of wound care nurse Melanie Burnam, defense counsel successfully objected to testimony comparing the odor of Mr. Carter's wounds to the severity of other odors that Ms. Burnam had experienced as irrelevant. 2RP 420. However, counsel failed to object to similar comments during the State's opening statement, Dr. Elizabeth Lien's testimony, and Detective Witt's testimony. 2RP 311; 2RP 484; 2RP 537.

Judge Schwartz allowed Ms. Burnam to testify at trial, over defense counsel's objection that the question called for speculation, as to her opinion of the potential cause of marks on the trunk of Mr. Carter's body, based upon her "experience" in her field. 2RP 430-31.

Like the other pressure wounds, Ms. Burnam testified that friction or other continual contact would cause such skin damage, but went on to speculate that, due to their "unusual" location, fairly high above the waist, the

cause of the marks was probably some type of “strap” or “damage around the waist.” 2RP 430-31. The State argued in closing that the “restraint” marks indicated a sinister decline in the relationship between Mr. Carter and Mr. Lee. 2RP 776-77.

D. ARGUMENT

**1. The State failed to prove a causal connection between Mr. Carter’s death and a criminal act with evidence independent of Mr. Lee’s admissions.**

The jury “may not consider a defendant’s extrajudicial confession or admissions unless independent proof prima facie establishes the corpus delicti.” *State v. Cobelli*, 56 Wn. App. 921, 924, 788 P.2d 1081 (1989).

In Washington, “a confession, standing alone, is insufficient to establish the corpus delicti of a crime ... if there is independent proof thereof, such confession may then be considered in connection therewith and the corpus delicti established by a combination of the independent proof and the confession.” *State v. Smith*, 115 Wn.2d 775, 780–81, 801 P.2d 975 (1990) (*quoting Bremerton v. Corbett*, 106 Wn.2d 569, 574–75, 723 P.2d 1135 (1986)). In this context, “‘prima facie’ means that there is ‘evidence



of sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proven." *Id.* at 781.

In a murder case, "the corpus delicti consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a criminal act." *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). The rule "arose from a judicial distrust of confessions, coupled with the view that a confession admitted at trial would probably be accepted uncritically by a jury ... [it] protects defendants from unjust convictions based upon confessions alone which may be of questionable reliability." *Id.* at 656-57.

In *Aten*, apart from a series of contradictory statements about an infant's death by her caretaker, the State submitted evidence that the victim died of acute respiratory failure, which could have been the result of suffocation. But it was impossible to determine in an autopsy whether SIDS or suffocation caused the infant's respiratory failure. *Id.* at 659. Therefore, the State failed to prove the corpus delicti of criminal negligence, the criminal

agency of second degree manslaughter, because the independent evidence supported a reasonable inference of both criminal negligence and innocence as causes of death. *Id.* at 659-661.

Felony murder in the second degree with a predicate felony of first and/or second degree criminal mistreatment would derive its criminal agency from a showing that Mr. Lee was either “employed” or “assumed the responsibility” to provide the basic necessities of life to Mr. Carter at the time of his death and that Mr. Lee recklessly withheld a basic necessity of life. RCW 9A.42.020(1); RCW 9A.42.030(1). The causal connection “between the death of the decedent and the unlawful acts of the [accused] cannot be supported on mere conjecture and speculation.” *State v. Little*, 57 Wn.2d 516, 521, 358 P.2d 120 (1961). The independent evidence must support an inference that the accused committed “the specific crime with which [he] has been charged.” *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006), as amended (Jan. 26, 2007).

At the time of Mr. Carter’s death, Mr. Lee’s employment to provide caregiving services had expired and

Mr. Carter's file with the State had been closed as no new caregiver had been designated. 2RP 589-591. Contrary to the State's pretrial offer of proof, the prosecution did not offer evidence of a verbal agreement between Mr. Lee and Ms. Barber for Mr. Lee to continue caregiving services; rather, Ms. Barber testified that Mr. Lee asked her if she wanted to provide funding for him to continue as a caregiver and she declined. 2RP 363.

The cause of Mr. Carter's death was sepsis, a bacterial infection of the blood, secondary to infected bedsores. 2RP 518-519; Ex. 22. This is not an inherently criminal cause of death. Indeed, the medical examiner, Dr. Clark, noted that Mr. Carter's developmental disability was likely a factor in his death, due to a possible inability to adequately care for himself. 2RP 524. Ordinarily, one adult is not responsible for the health or wellbeing of another, even if the parties have another relationship, such as a landlord-tenant relationship. Generally speaking, adults, even those who live together, do not owe one another the basic necessities of life.

Absent Mr. Lee's statements to law enforcement that he continued to provide care for Mr. Carter after his employment with the State to do so ended, and that he took measures to treat Mr. Carter's bedsores, such as packing and medicating his wounds, the prosecution offered no independent evidence that Mr. Lee was under a contractual or assumed duty to provide Mr. Carter with medical care or other necessities of life at the time of his death.

When Mr. Lee's statements are excluded, the remaining evidence supports both a reasonable inference that Mr. Lee criminally failed to care for Mr. Carter, and that Mr. Carter's death was the result of his own or some other person's failure to adequately care for him. The resulting conclusion is that the State failed to introduce sufficient independent evidence apart from Mr. Lee's statements to establish the corpus delicti of homicide. *Aten*, 130 Wn. 2d at 662.

The State woefully failed to establish "the nonexistence of any reasonable hypothesis of innocence" through independent evidence. *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967); *see also State v. Bernal*, 109

Wn. App. 150, 154, 33 P.3d 1106 (2001), as corrected (Dec. 7, 2001) (no independent evidence of source of lethal dose of heroin). Thus, this Court should reverse Mr. Lee's conviction.

**2. The trial court abused its discretion in granting the State a continuance of the trial to May 31, 2016.**

CrR 3.3(f)(2) provides limited justifications for continuing a trial beyond the permissible deadline for trial under CrR 3.3. The rule provides that the court "may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR (f)(2). The court must state on the record or in writing the reasons for the continuance. *Id.* A defendant not in custody must be brought to trial within 90 days of arraignment or within 30 days of a previously continued trial date. CrR 3.3(b)(2); CrR 3.3(c)(1).

This Court should reverse the trial court's grant of a continuance outside of the expiration of speedy trial if the continuance was a manifest abuse of discretion. *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993).

The unavailability of a material witness “is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.” *Id.* A prosecutor’s unavailability may or may not justify a continuance as a prosecutor has a “duty to responsibly schedule vacations and manage the office’s caseload.” *State v. Heredia-Juarez*, 119 Wn. App. 150, 154, 79 P.3d 987 (2003). Similarly, “[w]ithin reasonable limits, it is proper for the trial court to balance [the factors involved] in determining how to prioritize cases expiring at or near the same time.” *State v. Angulo*, 69 Wn. App. 337, 343, 848 P.2d 1276 (1993).

The factors that Judge Orlando relied upon on March 9, 2016 in denying the State’s motion for a continuance, including that the expert witness’ testimony was replaceable with that of another witness, support a conclusion here that a continuance to May 31, 2016 violated Mr. Lee’s right to a speedy trial. 1RP 16. Judge Orlando properly failed to conclude on March 9, 2016 that

the detective's scheduling conflict the first week of April, 2016 was a true conflict.

Judge Schwartz's March 24, 2016 order lists expert witness unavailability and "assigned DPA Nelson's" unavailability as the court's reasons for a continuance. CP 42. With regard to the State's scheduling conflict, Mr. Lee's case had two assigned prosecutors. Thus, it was unnecessary even to reassign the case to facilitate both the scheduling challenge and Mr. Lee's speedy trial rights. Nor was there a need for the court to prioritize between Mr. Lee's speedy trial rights and another defendant's speedy trial rights.

More importantly, the State failed to raise the trial conflict issue on March 9, 2016, which suggests that the problem did not exist at that time. It did not comply with the prosecutor's duty to manage the caseload of the office for Mr. Nelson to schedule the two cases in such a way as to create a trial conflict with Mr. Lee's case after the trial court had already denied a continuance on March 9, 2016. *Heredia-Juarez*, 119 Wn. App. at 154.

Finally, the continuance from March 24th to May 31st was not a brief continuance. General prejudice, such as the fading of witness memories, was unavoidable given a continuance of this length. This Court should find that the granting of a continuance to May 31, 2016, was a manifest abuse of discretion and reverse Mr. Lee's conviction.

**3. The trial court abused its discretion in admitting speculative expert opinion as to the cause of ambiguous marks on Mr. Carter's body.**

In Washington, expert evidence must assist the jury in understanding the evidence or determining a fact in issue, and medical evidence on a causal relationship "must be based upon a more probable than not basis." *Torno v. Hayek*, 133 Wn. App. 244, 250, 135 P.3d 536 (2006); ER 702. The trial court has wide discretion in making such assessments so long as the conclusion is "fairly debatable." *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 83 (2001).

The expert's conclusion must have an "adequate factual basis." *Id.* at 149. Speculative testimony is "not rendered less speculative or of more consequence to the jury's determination simply because it comes from an



expert.” *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007).

The causation opinion of a medical expert is less likely to be helpful to the jury if it “is a matter within a lay person's competence.” *State v. Southard*, 347 Or. 127, 134, 218 P.3d 104 (2009). With regard to a diagnosis of abuse, many courts have found under rule 702 that “the degree to which the diagnosis advances the jury's ability to evaluate the evidence is minimal and that the risk that the jury will defer to the expert's assessment outweighs whatever probative value the diagnosis may have.” *Id.* at 141-42; *see also State v. Sanchez-Alfonso*, 352 Or. 790, 804, 293 P.3d 1011 (2012) (conclusion that victim's injury was the result of abuse by defendant “did not satisfy the requirements” of rule 702.)

The trial court permitted Melanie Burnam to testify as to her opinion of the cause of certain marks on Mr. Carter's body based solely upon her “experience” in the field. 2RP 430-31. Based apparently exclusively on the location of the skin degradation, Ms. Burnam opined that the marks were due to a restraint “strap”, which the State

relied upon to Mr. Lee's clear prejudice in characterizing his relationship with the victim during its closing argument. 2RP 776-77. Ms. Burnam's testimony was not corroborated by the testimony of the medical examiner. 2RP 524.

The speculative nature of Ms. Burnam's opinion of the cause of the marks on Mr. Carter's trunk did not satisfy the "more probable" standard under ER 702 and was not "less speculative ... simply because it [came] from an expert." *Lewis*, 141 Wn. App. at 389.

As in *Southard* and *Sanchez-Alfonso*, the determination of whether Mr. Lee had abused Mr. Carter fell within the purview of the jury and Ms. Burnam's opinion on the subject offered little assistance beyond the jury's ability to draw its own conclusion from examining the marks.

Because of the scientific aura of Ms. Burnam's testimony, admitting such evidence was extremely prejudicial, as evidenced by its persuasive force in the State's closing. The trial court abused its discretion in overruling Mr. Lee's objection to the "restraint" testimony and there is no indication that such error was harmless.

**4. Defense counsel's trial representation was ineffective due to counsel's failure to competently investigate and research the issues in Mr. Lee's case.**

The right to effective assistance of counsel in defending a criminal charge is secured by the Sixth Amendment and article I, section 22 of the Washington Constitution. U.S. Const. amend. VI; Const. art. I, § 22; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. *Strickland*, 466 U.S. at 687.

"Deficient performance" under state and federal constitutional principles is performance that "falls below an objective standard of reasonableness." *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). In other words, the court must examine whether counsel's advocacy was commensurate with that of a "reasonably prudent" attorney. *State v. Greiff*, 141 Wn.2d 910, 925, 10 P.3d 390 (2000). Legitimate trial strategy or tactics do not constitute

deficient performance. *Id.* at 90. The test for prejudice is whether “but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.*

Washington courts have recognized as deficient trial counsel who “failed to familiarize himself with the relevant law and thus, was ill-equipped to provide his client with a full defense.” *State v. Estes*, 193 Wn. App. 479, 492–93, 372 P.3d 163 (2016). In *Estes*, the court examined the consequences of counsel’s failure to accurately understand the law applicable to a case, which has serious implications for the plea negotiation process.

Counsel’s duties in this regard include “not only communicating actual offers, but discussion of tentative plea negotiations and the strengths and weaknesses of a defendant’s case so that the defendant knows what to expect and can make an informed judgment whether or not to plead guilty.” *Id.* at 494. “Because *Estes*’s lawyer did not fully understand the consequences” of conviction, “he could not fully inform *Estes* of his options regarding

mitigation as offered by the State” and the court could not be assured that Estes received adequate counsel. *Id.*

Defense counsel who has not conducted a reasonably prudent examination of the law and the facts of a case may also prejudice a client at trial. For example, to promise in an opening statement “to produce exonerating evidence [that counsel had at his disposal] yet” fail to produce such evidence at trial may be deficient and prejudicial. *Greiff*, 141 Wn.2d at 925 (*quoting Anderson v. Butler*, 858 F.2d 16 (1st Cir.1988)).

Similarly, in *Lord v. Wood*, defense counsel’s failure to explore the option of producing witnesses who claimed to have seen the victim the day after the prosecution claimed she died based upon “a vague impression-apparently a misimpression” of a credibility problem with the witnesses without interviewing them in person was deficient performance sufficient “to undermine confidence” in the outcome of the trial. *Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999).

Interviewing witnesses falls within the duty of “trial counsel [to] investigate the case, and investigation includes

witness interviews.” *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Failure to call a witness for the defense may be justifiable if counsel “investigated the case and made an *informed* and reasonable decision against” doing so.” *Id.* at 340 (emphasis in original). Where the credibility of witnesses is in contest, and an absent witness would have bolstered the defense position, there exists “a reasonable probability that this would have affected the outcome.” *Id.* at 344-45.

Throughout Mr. Lee’s case, Mr. Cross acted upon his misunderstanding that the State was required to prove that Mr. Lee was receiving funding for caregiving services at the time of Mr. Carter’s death in order to establish a duty of care under RCW 9A.42.020(1) or RCW 9A.42.030(1) and this misunderstanding prejudiced Mr. Lee in multiple ways. *State v. Koch*, 157 Wn. App. 20, 30, 237 P.3d 287 (2010).

For example, to Mr. Lee’s detriment, defense counsel filed an affidavit signed by Mr. Lee containing facts that would support an inference that Mr. Lee assumed the responsibility to provide basic necessities of life while

simultaneously arguing that the “undisputed facts” demonstrated that no statutory duty of care existed. CP 9-10; CP 21-22; CP 29-30.

Mr. Cross was so confident in the strength of the “landlord/tenant” issue that he cited it as his justification for declining to interview the prosecution witnesses. 1RP 13. During his opening statement, Mr. Cross informed the jury that Mr. Lee “tried to help” Mr. Carter and that he provided “extras” beyond room and board. 2RP 318.

Mr. Cross’ failure to appreciate the risk of conviction through the “assumption of responsibility” means of criminal mistreatment in the first and/or second degree prejudiced Mr. Lee by impinging counsel’s ability to adopt a reasonably prudent theory at trial as well as counsel’s ability to realistically appraise the odds of success at trial.

A realistic appraisal of the odds of success at trial was necessary to accurately convey that information to Mr. Lee so that Mr. Lee could make an informed decision as to whether or not he should mitigate his situation by accepting a “low end” plea offer from the State. 2RP 5.

Counsel's failure to interview the witnesses that testified at trial was unreasonable and was prejudicial to Mr. Lee's defense. The witnesses that did testify appeared to surprise defense counsel with their responses. Their answers on cross examination contradicted counsel's comments during opening statement that Mr. Carter could have used the telephone himself and that Ms. Barber could have chosen surgery for Mr. Carter instead of comfort care. 2RP 318; 2RP 371-73.

The witnesses that did not testify, particularly Mr. Carter's doctor, could have bolstered Mr. Lee's defense by establishing, at a minimum, that an appointment was in fact scheduled for May 4, 2015, which Mr. Carter did not keep. This would have followed through with Mr. Cross' promise to the jury during opening statement and prevented the prosecutor from challenging Ms. Calhoun's credibility on that point. 2RP 757. Mr. Cross' stated reason for failing to interview the doctor, his belief that under HIPAA he could not do so, was surmountable through orders of the court for which Mr. Cross never applied. 45 CFR § 164.512(e)(1).



In each of the foregoing ways, counsel's advocacy in the trial court on behalf of Mr. Lee was not commensurate with that of a "reasonably prudent" attorney, but rather the actions of an attorney who inadequately investigated and prepared his case, to the clear detriment of his client.

**5. Repeated instances of prosecutorial misconduct denied Mr. Lee a fair trial.**

"In order to establish prosecutorial misconduct, [a defendant] must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005)).

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative

instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In determining whether the misconduct warrants reversal, reviewing courts consider its prejudicial nature and its cumulative effect. *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994); *Boehning* at 518-19. The several instances of prosecutorial misconduct outlined below cumulatively and individually denied Mr. Lee a fair trial.

**a. It is misconduct to make arguments without evidentiary support.**

It is improper for the State, which bears the burden of proof, to argue facts that are not in evidence. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). In doing so, the prosecutor becomes an unsworn witness against the defendant. *Id.* See also *State v. Case*, 49 Wn.2d 66, 68-70, 298 P.2d 500 (1956) (no evidence supported prosecutor's argument that incest victims often reported belatedly; argument constituted misconduct).

Here, the prosecutor argued in closing that Mr. Lee had training which informed him he was a mandatory reporter and that when a change in condition occurs with

the person he is caring for he must report it to a caseworker, Adult Protective Services or call 911 when something is life threatening. 2RP 751. This is an unsupported exaggeration of the evidence that was presented, and it did not apply to Mr. Lee at the time of Mr. Carter's death. Cynthia English explained to the jury that Mr. Lee completed an orientation that included a "15-minute spiel about mandatory reporting..." 2RP 612.

While Mr. Lee may at one time have had some requirement to report, the evidence at trial did not clarify what that requirement entailed. There was an attempt to define what a mandatory reporter is required to do; however, the definition was unclear and it was never established that Mr. Lee was actually under any mandatory reporting requirement at the time of Mr. Carter's death. 2RP 628-29. Ms. English is the only witness to testify that Mr. Lee watched a video regarding mandatory reporting, but she did not know what the video advised. 2RP 630.

While the State argued that Mr. Lee was required to call the case worker to report Mr. Carter's condition, the evidence fails to support this assertion as well. Ms. English

testified that she tells independent providers to, “Report changes. It does have an impact on the hours.” 2RP 629. Mr. Lee was initially screened and conditionally approved to be an independent caregiver to Mr. Carter. He was being paid a daily sum in order to provide this care. What Ms. English seemed to indicate regarding a report of changes was not so that emergency or medical treatment could be rendered but so that the agency could adjust the number of hours of care that is required for the client.

The prosecutor continuously argued that Mr. Lee had a mandatory reporting obligation that he failed to abide by and conflated this duty with the law properly applicable to the case. 2RP 756-758; 2RP 777-778. The defense failed to object to this line of argument. However, with no evidentiary support for these arguments, the repeated indication to the jury that he was required to report what was happening to Mr. Carter certainly denied Mr. Lee a fair trial. The prosecutor led the jury to believe that Mr. Lee had a higher duty to Mr. Carter than he actually did, but this duty was unsupported by any evidence or the court’s instructions to the jury.

**b. It is misconduct to continue to elicit inadmissible testimony after an objection to the same has been sustained.**

Throughout the trial, several witnesses testified about the odor present in Mr. Lee's home and at the hospital. Initially, the prosecutor attempted to elicit testimony that would compare the odor observed in this case to other odors observed throughout each witness' career. The prosecutor asked registered nurse Melanie Burnam, "And how did this case, in the context of your experience, compare to your past experience?" 2RP 418. Defense counsel objected and the Court sustained the objection. 2RP 418. The prosecutor then asked, "Can you describe the odor with more specificity?" to which the witness replied, "It was probably one of the worst -" 2RP 418. Defense counsel objected again at which time the judge excused the jury. The Court determined that defense counsel was "correct...that comparing this as the worst that I have ever smelled or whatever is not relevant." 2RP 420.

After the ruling from the Court, the State continued to elicit similar evidence from other witnesses. Infectious disease specialist Elizabeth Lien testified in part, "He had

wounds that were the worst I had ever seen in my life, and I didn't think that those were survivable.” 2RP 484. There was no objection made by defense at that time.

Eliciting such testimony was so “flagrant and ill intentioned” that it would have caused a level of prejudice that a curative instruction could not have remedied. Stating that odors and wounds were the worst that one has ever seen or experienced with no basis for the comparison is not only irrelevant and misleading, but also extremely difficult to reverse in a juror’s mind. By the State eliciting such testimony after the Court’s ruling, Mr. Lee was denied a fair trial.

**c. It is misconduct to appeal to the passion and prejudice of the jury.**

A prosecutor enjoys “wide latitude to argue reasonable inferences from the evidence,” but “must ‘seek convictions based only on probative evidence and sound reason.’” *In re Restraint of Glasmann*, 175 Wn.2d 696, 704, 206 P.3d 673 (2012) (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). Thus, a prosecutor “‘should not use arguments calculated to

inflame the passions or prejudices of the jury.’’ *Glasmann*, 175 Wn.2d at 704 (quoting *American Bar Association, Standards For Criminal Justice* std. 3-5.8(c) (2d ed. 1980)).

A prosecutor commits misconduct by “‘indulg[ing] in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only [be] to arouse passion and prejudice.’” *In re Restraint of Cross*, 180 Wn.2d 664, 723, 327 P.3d 660 (2014) (quoting *Vereck v. United States*, 318 U.S. 236, 247, 63 S.Ct. 561, 87 L.Ed. 734 (1943)).

Here, the State introduced as Exhibit 51, a photograph of the victim, Mr. Carter, smiling and waving as he stood next to a car. 2RP 355. The photo was taken approximately 15 years before his death. 2RP 355. The defense failed to object to the admission of the photo. This photograph, however, held no probative value and was used in closing argument in the prosecutor’s Power Point presentation for no other discernible reason than to appeal to the passion and prejudice of the jury. Ex. 97. Mr. Lee was thereby denied a fair trial, as the jurors were likely swayed not by the facts and evidence discussed while the

Power Point was displayed, but by an emotional response to the photograph.<sup>1</sup>

**6. The accumulation of errors in Mr. Lee's case requires a new trial.**

The accumulation of errors that, standing alone, may not be of “sufficient gravity to constitute grounds for reversal,” may require a new trial. *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). In *Coe*, the combined effect of the trial court's evidentiary errors and the prosecutor's violation of discovery rules necessitated a new trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *see also State v. Perrett*, 86 Wn. App. 312, 323, 936 P.2d 426 (1997) (three evidentiary errors that were not reversible standing alone provided independent grounds for reversal when considered together). Even if the irregularities below do not constitute reversible error standing alone, when considered together, these errors require a new trial.

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<sup>1</sup> Credit to Attorney Megan Powers, Callahan Law P.S., Inc., for the contribution of briefing regarding prosecutorial misconduct.



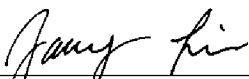
E. CONCLUSION

The trial court erred in allowing the jury to consider Mr. Lee's admissions without the State first introducing the corpus delicti of murder and abused its discretion in continuing the trial and in admitting a nurse's speculative and prejudicial causation testimony.

Trial counsel's performance was constitutionally deficient in a manner that prejudiced Mr. Lee. The prosecutor committed flagrant and ill-intentioned misconduct during closing argument that was incurable by instruction.

The cumulative effect of these irregularities was to deprive Mr. Lee a fair trial. This Court should reverse and remand Mr. Lee's conviction, with instructions for dismissal or, in the alternative, a new trial.

Respectfully submitted this 5th day of January, 2017.

  
\_\_\_\_\_  
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Attorney for Appellant

COURT OF APPEALS, DIVISION TWO  
STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,  
vs.

LARRY J. LEE, JR.,  
Appellant.

Sup. Ct. No: 15-1-02250-6  
Ct. of Appeals No: 49158-3-II

DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on January 5, 2017, I served one true and correct copy of the Brief of Appellant by hand delivery and the Verbatim Report of Proceedings by e-mail with the following:

Michelle Hyer  
Pierce County Prosecutor  
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I further certify that on January 5, 2017, I caused a copy of the Brief of Appellant to be mailed to the following:

Larry J. Lee, Jr.  
DOC # 392088  
Washington State Penitentiary - MSC Unit V.  
1313 N. 13th Ave  
Walla Walla , WA 99362

Respectfully submitted this 5th day of January, 2017.

A handwritten signature in black ink, appearing to read "Jacey Liu", is positioned above a horizontal line.

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